



Comptroller General
of the United States

Washington, D.C. 20548

11-24-93

Decision

Matter of: Inter-Con Security Systems, Inc.

File: B-257360.3

Date: November 15, 1994

Allen Samelson, Esq., Rogers, Joseph, O'Donnell & Quinn, for the protester.

Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.

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DIGEST

Protest that the agency failed to clearly convey its minimum labor requirements for an A-76 cost comparison, an argument which is based on an alleged impropriety in the solicitation apparent prior to the closing time for the submission of proposals, but not raised until after the results of the cost comparison were announced, is untimely. In any event, the solicitation clearly provided the labor requirements for commercial offerors and the government, and the record fails to support the protester's position that it did not understand what was required by the solicitation's performance work statement.

DECISION

Inter-Con Security Systems, Inc. protests the decision of the Department of the Air Force, under request for proposals (RFP) No. F04689-93-R-0001, to provide security police services in-house at Onizuka Air Force Base in Sunnyvale, California, and at five housing areas at Moffett Naval Air Station, Mountain View, California, as opposed to awarding it--the incumbent contractor--a contract for these services. The protester basically challenges the Air Force's cost comparison decision made pursuant to Office of Management and Budget (OMB) Circular No. A-76.

We dismiss the protest.

The RFP was issued on July 16, 1993, as part of an A-76 cost comparison study between the low, technically acceptable commercial offeror and the government. Section C-1 of the RFP's performance work statement (PWS), captioned "General,"

included a statement of general intent and a mission statement. The statement of general intent provided that the procurement was "for the acquisition of a Security Police service," specifically:

"those duties performed on USAF [United States Air Force] bases by USAF Security Police. . . . As such, this is not a contract for night watchmen or minimal guard services; it is a contract for a fully trained Contract Security Police Force whose capability and quality is equal to that of the USAF Security Police."

The mission statement provided that the Contract Security Police Force will "maintain a secure environment, . . . [including] the protection of USAF Priority resources, the maintenance of law and order and the safeguarding of government property and classified information. . . . [I]t is essential [that] the force acquired under this [PWS] be a well trained, highly motivated, professional organization."

The RFP included service requirements for approximately 30 programs and/or systems covered by the PWS, for which each was subdivided into various tasks. Each task was described by a service standard, a performance requirement, a method of surveillance, and a minimum payment percentage.

Amendment No. 0002 to the RFP, issued on September 20, 1993, included a Department of Labor (DOL) wage determination, No. 80-0853 (Rev. 12), dated October 27, 1992, which incorporated the collective bargaining agreement (CBA), dated November 20, 1990, between the protester and the Onizuka Peacekeeper Association, the employees' union. The CBA listed 20 classes of employees and wage rates for each class (ranging from \$14.88 to \$26.53 per hour). The wage rates would increase by 5 percent on each anniversary date of the CBA. In accordance with the Service Contract Act (SCA) of 1965, as amended, 41 U.S.C. § 351 et seq. (1988), those persons employed by the incumbent or a successor contractor in performing the required services and who were covered by the CBA were to be paid wages and fringe benefits as set forth in the CBA.

Amendment No. 0005 to the RFP, issued on October 21, 1993, included clause No. I-284, captioned "Statement of Equivalent Rates for Federal Hires," Federal Acquisition Regulation § 52.222-42. In compliance with the SCA and applicable regulations, this clause identified 10 classes of service employees expected to be employed under the contract by the government, identifying the applicable general schedule (GS) levels (ranging from GS-04 at \$8.48 per hour

to GS-12 at \$20.85 per hour) and stating the wages and fringe benefits to be paid. The statement was provided for information purposes only, and was not to be considered a wage determination.

Amendment No. 0005 also contained approximately 150 contractor site visit/pre-proposal questions, many with numerous subquestions, and agency answers concerning the terms and requirements of the RFP. As relevant to this protest, the following are some of the questions which were submitted by the protester to the agency, by letter dated August 9, 1993, and the agency's responses:

"131. Q. A valid comparative cost analysis under [C]ircular A-76 specifies that both Government and [c]ommercial cost figures must be based on the same scope of work and the same level of performance. Direct labor costs are composed of two factors: The first is the time it takes to do the job and the second is the rate(s) of pay for the labor skills required.

"Section C[-1] of the [RFP][,] entitled "Statement of General [Intent][,]" states that "[t]his [PWS] is written for the acquisition of a Security Police service. The term "Security Police service" refers to those duties performed on USAF bases by USAF Security Police with some exceptions. As such, this is not a contract for night watchmen or minimal guard services; it is a contract for a fully trained Contract Security Police [Force] whose capability and quality is equal to that of the USAF Security Police."

". . . Clause I-284 of the [RFP][,] entitled "Statement of Equivalent Rates for Federal Hires[,]" sets forth the wages and fringe benefits that would be paid by the contracting activity to the various classes of service employees expected to be utilized under the contract.

"Q. a. Bearing the preceding statements in mind, do the labor skills associated with the employee classes listed in . . . [c]lause I-284 of the [RFP] meet the requirements of section C[-1] of the [RFP] which mandates a force "whose capability and quality is equal to that of the USAF Security Police"?

"A. a. Yes, the labor classifications listed in [clause] I-284 of the [RFP] do meet those requirements specified in section C[-1] whose capability and quality is equal to that of the USAF Security Police.

"Q. b. Please furnish the entire official job description for each employee class listed in [clause] I-284. . . .

"A. b. The job descriptions for this requirement can[not] be release[d] at this time[;] however, they have been written to comply fully with the PWS requirements. . . . Once the job descriptions were written[,] they were classified based on Office of Personnel Management (OPM) Classification Standards, dated Apr[il] [19]88. The title of the series used was Grade Evaluation Guide for Police and Security Guard Positions, Series GS-085.² This document is available through the OPM office in San Francisco.

"84. Q. What GS schedule and GS levels did the Air Force use to determine wage rates?

"A. The Department of Labor issues the wage determination and is not based on the GS Schedule. This solicitation has a collective bargaining agreement, which each offer[or] must use in preparing [its] price proposal. The Government will use the information contained in [clause] I-284 for its labor cost in [its] proposal."

The RFP stated that the award, for the base period and four option periods, would be made to the low, responsive, i.e., technically acceptable, and responsible offeror. However, the RFP advised that the procurement was part of an A-76 cost comparison and a contract would only be awarded if contractor performance were deemed more economical than government performance.

Professional Services Unified, Inc. (PSU) was the technically acceptable, low evaluated price offeror; and the protester was the technically acceptable. second low

¹The answer quoted is the more complete answer given in response to question No. 80, which basically is the same question as question No. 131.

²In the OPM guide, Series GS-085 describes the "security guard series," while Series GS-083 describes the "police series."

evaluated price offeror.¹ Accordingly, as part of the A-76 cost comparison, PSU's low evaluated price was compared with the government's in-house performance price. The government's in-house performance price was approximately 35 percent less than PSU's price. Therefore, the agency determined that it was more economical to perform the services in-house rather than awarding a contract to a commercial offeror. This protest followed.²

The protester essentially argues that the agency's A-76 cost comparison was defective because the government and commercial offerors were not competing on the basis of the same requirements.³ Relying on the PWS' statement of general intent which calls "for a fully trained Contract Security Police Force whose capability and quality is equal to that of the USAF Security Police," and to the PWS' mission statement that the "force acquired be a well trained, highly motivated, professional organization," the protester argues that the agency did not clearly convey to commercial offerors, like itself, and/or relaxed for the government its requirements as described in the PWS. In this regard, the protester contends that the government's

¹PSU submitted the low evaluated price vis-a-vis the protester after the application of the 10 percent SDB evaluation preference to the protester's best and final offer (BAFO) pursuant to Defense Federal Acquisition Regulation § 252.219-7006.

²PSU and the protester filed administrative appeals of the agency's cost comparison decision pursuant to Air Force Pamphlet (AFP) No. 26-12, Guidelines for Implementing the Air Force Commercial Activities Program, dated September 25, 1992, OMB Circular No. A-76. The agency denied both appeals. PSU's subsequent protest to our Office was dismissed because the firm failed to exhaust the agency's administrative appeal process for issues it sought to raise in its protest. Professional Servs. Unified, Inc., B-257360.2, July 21, 1994, 94-2 CPD ¶ 39.

³For purposes of this decision, we have assumed that the protester was the technically acceptable, low evaluated price offeror, and therefore, its price, not PSU's price, was compared to the government's in-house performance price. Therefore, we need not address the protester's other arguments, including a challenge of the agency's evaluation of PSU's experience; the agency's unequal weighting of evaluation factors; or the agency's failure to apply the SDB evaluation preference to the government's in-house performance price.

direct labor costs were based upon lower wage rate "security guard" personnel with the "lowest possible" qualifications and skills, while commercial offerors based their direct labor costs upon higher wage rate law enforcement personnel with significant law enforcement training and experience. For this reason, the protester maintains that as a commercial offeror, it was placed at a competitive disadvantage vis-a-vis the government.

OMB Circular No. A-76 describes the executive branch's policy on the operation of commercial activities that are incidental to the performance of government functions. It outlines procedures for determining whether commercial activities should be operated under contract by private enterprise or in-house using government facilities and personnel. Generally, such decisions are matters of executive branch policy that our Office declines to review. However, we will review A-76 decisions growing out of an agency's issuance of a competitive solicitation for the purpose of comparing the cost of private and governmental operation of the commercial activity to determine whether the comparison was faulty or misleading. See Raytheon Support Servs. Co., B-228032.2, Dec. 30, 1987, 87-2 CPD ¶ 641.

Our review of agency decisions to retain services in-house instead of contracting for them is solely to ascertain whether the agency followed the announced "ground rules" for the cost comparison. Ameriko Maintenance Co., B-243728, Aug. 23, 1991, 91-2 CPD ¶ 191. We will recommend corrective action when the record shows both that the agency did not follow the announced procedures and that this failure could have materially affected the outcome of the cost comparison. Id. Here, we conclude that the protester's argument is untimely, and in any event, is not supported by the record.

In this case, prior to the submission of phase one technical proposals, the agency placed all commercial offerors on notice, through amendment No. 0005, particularly its responses to the protester's site visit/pre-proposal questions, that the labor classifications in clause I-284, which contained a statement of equivalent rates for federal hires, satisfied the requirement in the PWS mandating a force "whose capability and quality is equal to that of the USAF Security Police." The agency also notified commercial offerors in amendment No. 0005 that "Series GS-085," which

'We note that the record for this protest was not complete until October 31, 1994.

corresponds to the OPM "security guard series," was the basis for the labor classifications in clause I-284 which would serve as the basis for the government's in-house performance price.

The record shows that the protester acknowledged in its initial price proposal and BAFO its receipt of amendment No. 0005 (as well as the other amendments). Nevertheless, the protester argues that the agency failed to clearly convey its requirements as described in the PWS, suggesting that either the lower wage rate labor classifications in clause I-284 fail to satisfy these requirements, or that the higher wage rate labor classifications in the CBA exceed these requirements. However, we conclude that this argument, based on an alleged impropriety in the RFP (i.e., inconsistent labor classifications in view of the requirements in the PWS) which was apparent prior to the closing time for receipt of technical proposals, or in any event, no later than the closing time for receipt of initial price proposals, but not raised until after the results of the cost comparison were announced, is untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1994).

In any event, the record does not support the protester's current contention that the requirements described in the PWS were not clearly conveyed to commercial offerors and/or were relaxed for the government. Rather, a comparison of the protester's BAFO and the government's in-house performance price reveals similar understandings concerning which labor classifications and corresponding wage rates in either the applicable CBA or clause I-284 would satisfy the particular requirements in the PWS. For example, the record shows that both the protester and the government used lower wage rate "guard" classifications as the basis for calculating a significant portion of their respective direct labor costs. The protester based approximately 68 percent of its direct labor costs on the "guard (armed)" labor classification. In the CBA, while for approximately 60 percent of its direct labor costs, the government used the "security guard, GS-05" labor classification. In addition, the record shows that the protester used the higher wage rate "law enforcement specialist" labor classification for its investigator, which it states is a management position; just as the government used the "supervisory security specialist, GS-12" labor classification for a management position; and the "security specialist, GS-11" labor classification for an investigator position.⁷

⁷We recognize that the government's equivalent wage rates were significantly less than the wage rates required to be
(continued...)

Finally, we point out that the protester, in the introductory chapter of its technical proposal and in its cover letter to its price proposal, acknowledges that the RFP required minimal police experience, but that its work force significantly exceeded the requirements in the PWS. In relevant part, the protester states:

"Throughout the nine years of full security police services provided by [the protester], [the protester] has pursued the goal of providing services to the Air Force with the same proficiency, professionalism and commitment of the Air Force Security Police. . . . To achieve this goal, [the protester] has implemented a vigorous skills upgrade program, incorporating intensive initial and recurring training; a system of comprehensive quality control reviews; and a highly selective recruiting program. The result of these programs is a work force that significantly exceeds the requirements of the [PWS]. For example, while the PWS requires only minimal civilian or military police experience, a large majority of [the protester's] security police force at Onizuka are civilian and Air Force Security Police veterans, many with over 15 years of security and law enforcement experience." (Emphasis added).

Therefore, in light of the site visit/pre-proposal questions asked by the protester and responded to by the agency in amendment No. 0005 prior to the closing time for submission of technical proposals, the similarities between the protester's and the government's respective pricing schemes, and the protester's acknowledgment that the RFP required minimal police experience, we think the agency clearly conveyed, and the protester clearly understood, the minimum requirements in the PWS. Since the protester chose to

⁷(...continued)

paid by commercial offerors pursuant to the CBA. However, the SCA requires contractors performing government service contracts to pay DOL determined minimum wages and fringe benefits. The SCA is not applicable to employees of federal agencies. The fact that federal employees are not subject to the SCA and the applicable wage determinations does not constitute a legally impermissible competitive advantage for the government. In this regard, there is no requirement in the A-76 cost comparison "ground rules" to include a factor equalizing such inherent relative advantages and disadvantages of governmental and commercial entities. Ameriko Maintenance Co., supra; Paige's Sec. Servs., Inc., B-235254, Aug. 9, 1989, 89-2 CPD ¶ 118.

"significantly exceed" these requirements, it now cannot shift responsibility for its decision to the agency by speculating that the agency relaxed the requirements for the government, thus affording the government an unfair competitive advantage.⁹

Accordingly, based on the discussion above, we have no basis to disturb the agency's A-76 cost comparison decision that performance in-house was more economical, by approximately 30 percent (assuming the protester's price was used for cost comparison purposes), than contractor performance.

The protest is dismissed.



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Assistant General Counsel

⁹The protester also complains that the agency failed to conduct meaningful discussions on the basis of allegedly relaxed requirements. The RFP advised offerors that a final determination on the acceptability of a proposal may be made solely on the basis of the technical proposal as submitted without requesting any further information. As discussed, the agency did not relax requirements; instead, the protester voluntarily chose to exceed the agency's stated requirements. On this basis, there was no reason to conduct discussions with the protester whose technical proposal was initially rated technically acceptable.